LIBRARY
SUPREME COURT, U. S.

No. 120

Office-Supreme Court, U.S.
FILED
MAY 7 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

CHEYENNE RIVER SIOUX TRIBE OF INDIANS, *Petitioner*

v.

UNITED STATES OF AMERICA AND
PETER HIATT, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM HOWARD PAYNE
1086 National Press Building
Washington, D. C. 20004
Counsel for Petitioner

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes and Constitutional Provisions Involved	2
Statement	2
Specification of Errors to be Urged	5
Reasons for Granting the Writ	5
Conclusion	9
Appendix—Statutes and Constitutional Provisions	10

CITATIONS

Cases:

Klapprott v. United States, 335 U.S. 601 9

Constitutional Provisions:

Amendment V, United States Constitution 5, 10

Statutes:

Public Law 776, 83d Congress, September 3, 1954, 68 Stat. 1191, et seq. 6, 7, 8, 9, 10

Public Law 870, 81st Congress, September 30, 1950, 64 Stat. 1093, et seq. 6, 7

Public Law 302, 82d Congress, April 8, 1952, 66 Stat. 46, et seq. 6

Miscellaneous:

Rule 60, Federal Rules of Civil Procedure 9

Sec. 16, Indian Reorganization Act, 48 Stat. 987-88 ..... 12, 13

Sec. 1 of Article IV Constitution and By-Laws of the Cheyenne River Sioux Tribe 13

IN THE

Supreme Court of the United States

October Term, 1964

No. .....

CHEYENNE RIVER SIOUX TRIBE OF INDIANS, *Petitioner*

v.

UNITED STATES OF AMERICA AND
PETER HIATT, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Cheyenne River Sioux Tribe of Indians prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on December 9, 1964.

OPINIONS BELOW

The memorandum opinion of the District Court (R. 57) is reported in 222 F. Supp. 911. The opinion of the Circuit Court of Appeals (See Proceedings in the U.S. Court of Appeals for the Eighth Circuit in Record) is reported in 338 F. 2d 906.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 9, 1964. On March 9, 1965, by order of Associate Justice Byron K. White, the Petitioner's time to file a petition for a writ of certiorari was extended to May 8, 1965. The jurisdiction of the Court is involved under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether an Indian Tribe is an indispensable party to an action wherein the judgment to be awarded is to be paid out of a fund in which the Tribe has a vested interest.

2. Whether an Indian Tribe is represented in an action where it is not made a party to the action, and where only the United States of America is represented as party plaintiff.

3. Whether the final judgment rendered by the District Court was in error in certain material aspects, i.e. the holding as to the vesting of title, and provision for interest on the judgment.

4. Whether the Court below correctly held that the Petitioner Indian Tribe's action to vacate and enjoin enforcement of a judgment which was to be paid from funds in which it had a vested interest was barred by *res judicata*, where Petitioner had taken no appeal from a denial of its motion to intervene in an earlier proceeding.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent statutory and constitutional provisions are printed in Appendix, *infra*, pp. 10-13.

STATEMENT

This case had its beginnings in Civil No. 274 C.D., in the District Court of the United States for the District of South Dakota, Central Division, wherein on June 6, 1957, a Complaint was filed for the ascertainment of just compensation to be paid for certain property of Peter Hiatt. (R. 1) The Plaintiff, United States of America, in said action, at the time of filing said action, deposited with the Clerk of the Court the sum of $12,469.17 (R. 2), based on the appraisal made by the Missouri River Basin Investigations Staff (R. 5). Any excess compensation over the

deposit of $12,469.17 was to be paid from Tribal funds paid over to the Petitioner, the Cheyenne River Sioux Tribe of Indians (R. 5). The Petitioner, the Cheyenne River Sioux Tribe of Indians was not however made a party to the action.

The action, Civil No. 274 C.D., was tried before a Commission commencing December 12, 1960 (R. 10), and on January 19, 1961, the Commissioners filed Proposed Findings of Fact and Conclusions of Law, finding a value of $23,090. (R. 11) On January 20, 1961, the Plaintiff, United States of America, filed Objections to Findings of Fact, Conclusions of Law and Report of Commissioners (R. 14), wherein it objected, in part, that "[t]he Conclusion of the Commission, in that it states that judgment should be entered against the United States, is erroneous in that Public Law 776, 83rd Congress, the act under which this property was taken, provides that any deficiencies shall be paid by the United States out of the funds appropriated by such act or agreement to the Sioux Indians of Cheyenne River Reservation in South Dakota" (R. 14).

On March 31, 1961, an Order Modifying Report of Commission and Adopting Such Modified Report (relative to the aforesaid Conclusion of the Commission) was filed by the District Court, and on May 9, 1961, Final Judgment was entered in accordance with said Order of March 31, 1961. The Final Judgment provided for "interest thereon at 6 per cent from the date of taking by Act of Congress, September 3, 1954, until paid" (R. 19).

The Petitioner filed a Motion to Intervene on June 28, 1961 (R. 20), accompanying it with Intervener's Motion for Relief from Judgment (R. 21) and Objections to Findings of Fact, Conclusions of Law and Report of Commissioners (R. 22). The Motion to Intervene was based on the ground that the real party in interest, who would be bound and adversely affected by the judgment of the District Court, was the Petitioner. The District Court on August 7, 1961, filed an Order Denying Motion (R. 25).

At the hearing on the Motion to Intervene, held July 18, 1961, the Court stated, "Of course, if it is an indispensable party, and since it wasn't named as a party plaintiff in this case, the judgment entered is not binding upon it and and the tribe, clearly, in view of those circumstances, is free to institute an independent action and bar recovery from funds which are in question," (Transcript, p. 46) and "I do believe, as I have indicated, that you are correct in your position, that the tribe is an indispensable party, and that this judgment is not binding on them." (Transcript, p. 49). On the basis of the statements of the Court, no appeal was taken of the Order Denying Motion. On February 2, 1962, the Petitioner filed a Petition to Vacate and Enjoin Enforcement of Judgment, in the District Court, being action designated Civil No. 378 C.D. (R. 27) Petitioner's Petition was based in part upon the fact that the Petitioner was an indispensable party to action Civil No. 274 C.D., had not been made a party to said action, and as such the judgment in said action as to the Petitioner was null, void and of no force and effect (R. 29). On March 13, 1962, the Defendant United States of America, filed a Motion to Dismiss (R. 38). After a hearing held on May 9, 1962, and consideration of briefs filed by all parties to the action, the District Court entered a Memorandum Decision on January 16, 1963, denying the Motion to Dismiss (R. 45).

Pursuant to the Memorandum Decision the Defendant United States of America filed an Answer on January 18, 1963 (R. 50), alleging among other things that the Petitioner was not an indispensable party, and that the allegations of Petitioner's Petition "are moot and are barred by the rule of res judicata" (R. 50).

On October 26, 1963, the District Court filed a Memorandum Decision (R. 57) denying Petitioner's Petition on the grounds of res judicata, based upon the proceedings in Civil Action 274 C.D. (R. 63). On December 16, 1963, Judgment was entered in the action, based upon the Memorandum Decision (R. 63).

Petitioner filed Notice of Appeal on February 13, 1964 (R. 64).

On appeal, the Court below on December 9, 1964, affirmed the District Court holding that Petitioner was not an indispensable party to the proceeding in Civil Action 274 C.D. and that the Petitioner was barred by *res judicata*. Based on these holdings it passed over consideration of whether there was a legal basis to support the inclusion in the judgment of interest on the amount of the deficiency from the date of taking, holding that Petitioner lacked standing to attack this aspect of the judgment.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Petitioner was not an indispensable party in the action where the judgment was to be paid out of a fund in which the Petitioner had a vested interest.

2. In holding that the United States of America was the only proper party to represent the Petitioner in the action.

3. In holding that the Petitioner's action to vacate and enjoin enforcement of the judgment was barred by *res judicata*.

4. In refusing to give consideration to the question of whether there was a legal basis to support the inclusion in the judgment of the District Court of interest on the amount of the deficiency from the date of the taking.

5. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals does violence to the basic constitutional principle (Amendment V of the United States Constitution) that "No person shall be * * * deprived of * * * property, without due process of law." In this case the Petitioner, who has a vested property

right in a fund from which the judgment in the earlier proceeding will be paid, is being deprived of that property without it being allowed "its day in court."

2. The decision of the Court of Appeals that Petitioner was not an indispensable party in an action where its property rights were being considered and whose rights would be affected by the judgment runs counter to the basic concept that one whose rights will be affected by a judgment is an indispensable party to the litigation.

In the courts below the contentions were that the relationships of the United States of America, and the Petitioner, in Civil No. 274 C.D., was the typical guardian-ward relationship. Unless the opposites, which are the true facts, are recognized, the Tribe will be irreparably harmed, damaged, and injured by the enforcement of the judgment in action Civil No. 274 C.D. The United States of America, the "guardian" will have raised its shield of guardianship, only to smash it down upon its ward.

Under the ordinary guardian-ward relationship between the United States of America and the Tribe, the Congress of the United States, in its infinite wisdom, legislates "ex parte" for the benefit of its ward, the Tribe. Public Law 776, 83d Congress, 68 Stat. 1191, et seq., the Act with which we are here concerned, was not such legislation. Public Law 776, was the end-product of several years of serious, arms-length negotiations between the Tribe, through a Negotiating Committee, and the United States of America, represented by the Chief of Engineers, Department of the Army, and the Secretary of the Interior. These negotiations were carried on pursuant to the authority of Public Law 870 (81st Congress), 64 Stat. 1093, et seq., as amended by Public Law 302 (82d Congress), 66 Stat. 46. These Acts were approved September 30, 1950, and April 8, 1952, respectively. By Public Law 870, the Congress of the United States, the Guardian, recognized that the Tribe had certain interests in the lands to be taken, that these interests could not be expropriated by "ex parte" legis-

lation, nor could they be expropriated without due process of law. Aforesaid Acts of 1950 and 1952 allowed a period of 28 months for the arms-length negotiation of contract with Apellant herein.

As further evidence that the Government's role of guardian was abandoned and arm's length negotiations took its place, negotiation and ratification of settlement agreement for the taking of Indian lands was provided. In the event the negotiating parties were unable to agree, the items in disagreement were to be reported separately to Congress for its consideration and determination (see Sec. 5(b), 64 Stat. 1095).

We need look only to Public Law 776, 83d Congress, the end product of said negotiations, for further evidence of the recognition by the Congress that the agreement with the Tribe was no ordinary piece of legislation. Preamble—Section 1 to said Public Law 776, supra, provides in explicit terms that it woud be effective only when confirmed and accepted in writing by three-quarters of the adult Indians of the Cheyenne River Reservation in South Dakota. The arms-length features of this Act are apparent.

3. The Court of Appeals in affirming the District Court adopts for itself the theory of *res judicata*. The District Court in testing the application of the doctrine of res judicata to the action before it satisfies itself that the "parties in Civil No. 274" and that the parties in the action before it, Civil No. 378, were the same (R. 63). This finding of the District Court and of the Court of Appeals in affirming can be nothing less than error, for the simple reason that in Civil No. 274, the Petitioner, the Cheyenne River Sioux Tribe of Indians, was never made a party. The Petitioner attempted to become a party by means of intervention, but the very District Court which now states that the Petitioner was a party in Civil No. 274, denied the Petitioner's Motion to Intervene (R. 25). These facts speak for themselves. Thus, a prerequisite for the invocation of the rule of res judicata, i.e., the

parties having been the same, is absent, and thus any finding or decision of the Courts below based on the doctrine of res judicata is error.

4. The Final Judgment in Civil No. 274 C.D., provides as to title as follows:

> "3. Title to the lands designated Parcel 917 and accurately and more particularly described in the Complaint are vested in the plaintiff United States of America to the exact extent stated in said Complaint."

If we look to the Complaint we find the following allegation as to title:

> "2. Title to the land hereinafter described included in this action was vested in the plaintiff pursuant to Act of Congress approved September 3, 1954 (Public Law 776—83d Congress.)"

The allegation in the Complaint was erroneous in that Section XV of Public Law 776, 83d Congress, the very section under which the action was instituted, provides explicitly as to when title vests in the United States. The last sentence thereof provides:

> "In the event the amount of the appraisal so deposited in said Court is not enough to cover the final judgment in said proceeding, the United States shall pay such difference from the fund of $5,384,014 established under Section II, hereof, into the hands of the Clerk of said Court *and thereupon title shall vest in the United States.*" (Emphasis supplied).

The amount of the deficiency judgment having not even now been deposited into the hands of the Clerk of the Court, title has not yet vested in the United States. The allegation in the Complaint being erroneous, the Final Judgment, incorporating said allegation is equally erroneous.

The Final Judgment in Civil No. 274 C.D., provides for interest on the deficiency judgment as follows:

> "4. Deficiency judgment is entered against the Sioux Indians of the Cheyenne, Sioux Indian Tribe, State of

South Dakota for the deficiency amount scheduled herein, together with interest thereon at 6 per cent per annum from the date of taking by Act of Congress, September 3, 1954, until paid."

The foregoing provision for interest is erroneous in that Public Law 776, to which Act one must look to determine the rights of all parties involved, i.e., the Tribe, individual Indians, and the United States, makes no provision for interest.

On the basis of these facts the District Court was in error in refusing to exercise its general power to vacate its own judgment, a power further evidenced by Rule 60 of the Federal Rules of Civil Procedure. Certain of the reasons cited therein for which a Court may relieve a party or his legal representative from a final judgment are "(4) the judgment is void" and "(6) any other reason justifying relief from the operation of the judgment."

The Supreme Court of the United States has held with regard to subdivision (b) (6) of Rule 60, that subdivision quoted above, that such (b) (6) vests the Court with power adequate to enable it to vacate judgment whenever such action is appropriate to accomplish justice. *Klapprott* v. *United States*, 335 U.S. 601. The facts herein were more than sufficient to justify the District Court to invoke its power to vacate the final judgment in Civil No. 274 C.D. The action of the Court of Appeals in affirming the District Court just accentuates the injustice to Petitioner.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM HOWARD PAYNE
1086 National Press Building
Washington, D. C. 20004
Counsel for Petitioner

May 7, 1965

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 1965, copies of the foregoing Petition For a Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit were served by first class United States mail, postage prepaid, addressed to The Solicitor General, Department of Justice, Washington, 25, D. C., and by United States air mail, postage prepaid, addressed to Honorable Harold C. Doyle, United States Attorney for the District of South Dakota, Federal Building, Sioux Falls, South Dakota; Warren W. May, Esquire, Martens, Goldsmith, May and Porter, 436 South Pierre Street, Pierre, South Dakota; and Ramon A. Robideaux, Esquire, Robideaux, Poches and Reade, Fort Pierre, South Dakota, attorneys of record for Respondents.

WILLIAM HOWARD PAYNE

APPENDIX A

Amendment V, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Preamble—Section I, Section II and Section XV of the Act of September 3, 1954, Public Law 776, 83d Congress, 68 Stat. 1191:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That this agreement between the United States of America and the Sioux Indians of Cheyenne River Reservation in South Dakota, Witnesseth, That this agreement when enacted by Congress and when

confirmed and accepted in writing by three-quarters of the adult Indians of the Cheyenne River Reservation in South Dakota, as shown by the trial rolls of the said reservation, does hereby convey to the United States all tribal, allotted, assigned, and inherited lands or interests within said Cheyenne River Reservation belonging to the Indians of said reservation, which lands are required by the United States for the reservoir to be created by the construction of the dam across the Missouri River in South Dakota, now known as Oahe Dam, including such lands along the margin of said proposed reservoir as may be required by the Chief of Engineers, United States Army, for the construction, protection, development, and use of said reservoir all as described in part II of this agreement subject, however, to the conditions of this agreement hereinafter set forth: *Provided*, That the effective date of this Act, shall be the date when the Secretary of the Interior shall by proclamation declare that this agreement has been ratified and approved in writing by three-quarters of the adult members of said Indians as above defined.

"SECTION II. The United States agrees to pay, out of funds appropriated for construction of the Oahe project, as just compensation for all lands and improvements and interests therein (except the agency hospital) conveyed pursuant to section I of this Act; and for the bed of the Missouri River so far as it is the eastern boundary of said Cheyenne River Reservation, the sum of $5,384,014; which sum shall be in final and complete settlement of all claims, rights, and demands of said Tribe or allottees or heirs thereof arising out of the construction of the Oahe project, and shall be deposited to the credit of said Tribe in the Treasury of the United States, to draw interest on the principal thereof at the rate of 4 per centum per annum until expended: PROVIDED, That the said Tribal Council with the approval of the Secretary of the Interior shall distribute the sum of $2,250,000 in accordance with the revised appraisal of the Missouri River Basin investigation staff of the Department of the Interior."

"SECTION XV. The right of any individual member of said Indian Tribe to reject the final appraisal made on his land and improvements shall be preserved and, if any individual does reject such final appraisal, he

shall file notice of such rejection by notice in writing to the Chief of Engineers, United States Army, who shall thereupon file a proceeding in the United States District Court of the District of South Dakota as in a condemnation proceeding and jurisdiction is hereby conferred upon said Court to determine, by procedure corresponding to a condemnation proceeding, the value of said land and improvements and the said Tribal Council shall deposit with the clerk of said court the full amount set out in the final appraisal which was previously offered to said individual, which fund shall be used in payment in full or in part of the final judgment of said United States District Court. Cost of such proceedings shall be borne by the United States and the individual involved shall be entitled to counsel at his own expense. In the event the amount of the appraisal so deposited in said Court is not enough to cover the final judgment in said proceeding, the United States shall pay such difference from the fund of $5,384,014 established under section II, hereof, into the hands of the clerk of said Court and thereupon title shall vest in the United States."

Section 16 of the Indian Reorganization Act, 48 Stat. 987-88:

"Any Indian Tribe or Tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinafter provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

"In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or

its tribal council the following rights and powers: *To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior;* to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress." (Emphasis added.)

Section I of Article IV of the Constitution and By-Laws of the Cheyenne River Sioux Tribe, adopted pursuant to the Indian Reorganization Act, 48 Stat. 984, provides for "Powers of Self-Government." Section I provides in part as follows:

"The tribal council of the Cheyenne River Reservation shall exercise the following powers vested in the present council under existing laws or conferred by the act of June 18, 1934 (48 Stat. 984) and acts amendatory thereof or supplemental thereto, subject to any limitations imposed by the statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this constituion and the attached by-laws.

"(a) To enter into negotiations with the Federal, State, and local Governments on behalf of the tribe.

"(b) To present and prosecute any claims or demands of the Cheyenne River Sioux Tribe of Indians. It shall have the right to assist members of the tribe in presenting their claims and grievances before any court or agency of government. It shall have the right to employ attorneys of record or representatives for such services, the choice of counsel and fixing of fees to be subject to the aproval of the Secretary of the Interior . . .

"(1) To purchase under condemnation proceedings, land or other property needed for public purposes, subject to the approval of the Secretary of the Interior."